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Nos. 84-143 & 84-28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, *et al.*,
Appellants,

v.

J-R DISTRIBUTORS, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

CONCERNED WOMEN FOR AMERICA EDUCATION AND LEGAL DEFENSE FOUNDATION
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QUESTION DISCUSSED

Is it unconstitutional to include the word "lust" in a statutory definition of "prurient interest?"

TABLE OF CONTENTS

Page

QUESTION DISCUSSED i

TABLE OF AUTHORITIES iii

I. INTEREST OF AMICUS AND EXPERIENCE OF COUNSEL 1

II. THE DRAFTSMAN'S RATIONALE FOR DEFINING THE TERM "PRURIENT INTEREST" 1

III. CONSTITUTIONAL DECISIONS SHOULD NOT BE PREMISED ON THE DICTIONARY THE LEGISLATIVE DRAFTSMAN HAS AVAILABLE 3

IV. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE TERM "PRURIENT" IS ONLY ONE ELEMENT NECESSARY TO ACHIEVE A FINDING OF OBSCENITY 5

V. CONCLUSION 7

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases: Page

J-R Distributors, Inc. v. *Eikenberry*,
725 F.2d 482 (1984) 2, 6, 7

Miller v. *California*,
413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973) 6

Roth v. *United States*,
354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957) 2, 3, 5, 7

Spokane Arcades, Inc. v. *Brockett*,
631 F.2d 135 (9th Cir. 1980); *aff'd*, 454 U.S. 1022,
102 S.Ct. 557, 70 L.Ed.2d 468 (1981) 1

United States v. *Bagnell*,
679 F.2d 826 (11th Cir. 1982) 2

Books and Treatises:

The Oxford English Dictionary
(Unabridged, 1933) 4

The Random House Dictionary of the English Language
(Unabridged, 1966) 4

Webster's New International Dictionary
(2d ed., 1945) 4

Webster's New International Dictionary
(Unabridged, 3d ed. 1976) 3

Webster's New International Dictionary
(Unabridged, 3d ed. 1976) 3

Webster's New Twentieth Century Dictionary
(Unabridged 2d ed., 1979) 4

Newspaper Articles:

Spokane *Daily Chronicle*, March 17, 1977, p.3,
"Films Held Not Obscene: More Prosecutions Likely" 2

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I

INTEREST OF AMICUS AND EXPERIENCE OF COUNSEL

Concerned Women for America Education and Legal Defense Foundation is a national, non-profit membership organization with over 500,000 members. At its annual convention held in Washington, D.C., on September 14 and 15, 1984, it adopted the following resolution:

> We call for the strict enforcement of laws against pornography. Crimes against women and children are ever increasing as a result of the antisocial decadence of the peddlers of obscenity.

Counsel of record for this amicus brief is General Legal Counsel for Concerned Women for America. He was previously in practice in Olympia, Washington. Counsel was the actual draftsman of the Washington state law before the court in this case, House Bill 626. Counsel drafted the definition of "prurient interest" which is the principal constitutional issue before this court.

II

THE DRAFTSMAN'S RATIONALE FOR DEFINING THE TERM "PRURIENT INTEREST"

As indicated by the Ninth Circuit Court of Appeals in its opinion below, *J-R Distributors, Inc.* v. *Eikenberry,* 725 F.2d 482, 484 (1984), House Bill 626 was indeed an effort to refine the 1977 anti-pornography initiative adopted by the voters of Washington state which was subsequently declared unconstitutional. *Spokane Arcades, Inc.* v. *Brockett,* 631 F.2d 135, 137-39 (9th Cir. 1980); *aff'd,* 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981).

The definition of the term "prurient interest" originated from a different legal situation, however. In various obscenity prosecutions in the state, jurors were expressing confusion over the term "prurient interest." Counsel for the defendants in such cases were arguing that "a shameful or morbid interest in sex" referred to "such things as bestiality, sado-masochism and sexual exploitation of children" and not heterosexual activity between adults. See, Spokane *Daily Chronicle,* March 15, 1977, p. 3, "Films Held Not Obscene, More Prosecutions Likely," attached as Appendix A. Similar legal arguments have been noted in other cases. See, e.g., *United States* v. *Bagnell,* 679 F.2d 826, 836 (11th Cir. 1982).

The purpose of this definitional section was to end juror confusion and to aid trial judges in defining the term "prurient interest" in ordinary language consistent with both the ordinary meaning of the word "prurient" and the decisions of this Court.

When drafting this term, counsel first reviewed the decisions of this Court. The decision of *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), of course, contains the original definition of that term. This court noted that an example of material appealing to the "prurient interest" was "material having a tendency to excite lustful thoughts." *Roth,* 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. Review of later cases of this Court indicated nothing to this draftsman which would render this language in *Roth* to be inappropriate.

House Bill 626 was drafted in the law library of the Supreme Court of the State of Washington. This draftsman then turned to the principal unabridged dictionary in that library for assistance with the ordinary meaning of the word "prurient." This dictionary was *Webster's New International Dictionary* (Unabridged, 3d ed. 1961). The key definition in said dictionary which was used was "tending to incite lasciviousness." This dictionary defines lascivious as "inclined to lechery, lewd, or lustful tendencies."

Based on this Court's footnote in *Roth* and the dictionary definition of both "prurient" and "lascivious," this draftsman wrote the definition of "prurient interest" now found in House Bill 626, to wit: "that which incites lasciviousness or lust." This definition seemed to fit all the objectives of drafting: compliance with the rulings of this Court, adherence to the dictionary definition, and the use of ordinary language to end juror confusion.

It is, of course, the inclusion of the single word "lust" in House Bill 626 which was the basis of the Ninth Circuit's ruling that the bill was unconstitutional.

III

CONSTITUTIONAL DECISIONS SHOULD NOT BE PREMISED ON THE DICTIONARY THE LEGISLATIVE DRAFTSMAN HAS AVAILABLE

Apparently the Ninth Circuit had the 1976 version of *Webster's New International Dicitonary* (Unabridged, 3d ed.), while the Washington State Supreme Court law library contained the 1961 version. Such a fact should not give rise to a constitutional distinction rendering a law of the State of Washington unconstitutioinal on such a slender reed.

If one checks the unabridged dictionaries in the United States Supreme Court library one will discover that these dictionaries would lead a draftsman to the same conclusion as was reached while drafting in the State of Washington.

This Court's library contains the following: *The Oxford English Dictionary* (Unabridged, 1933); "prurient: given to the indulgence of lewd ideas; impure minded; characterized by lasciviousness of thought or mind"; "lascivious: inclined to lust, lewd, wanton; inciting to lust or wantonness." *Webster's New Twentieth Century Dictionary* (Unabridged, 2d ed. 1979); "prurient: inclined or disposed to lewdness or lascivious thoughts; having lustful ideas or desires." *The Randon House Dictionary of the English Language* (Unabridged, 1966); "prurient: having, inclined to have, or characterized by lascivious or lustful thoughts, desires, etc.; causing lasciviousness or lust." *Webster's New International Dictionary* (2d ed., 1945); "prurient: of

person's having itching, morbid or lascivious longings"; "lascivious: [see lust] wanton, lewd, lustful."

It is clear then that every unabridged dictionary available in this Court's library defines the term "prurient" to mean lasciviousness and lust, either by including both terms in the primary definition, or by defining the term "lascivious" to include the word "lust."

The Ninth Circuit found no constitutional problem in House Bill 626 by the inclusion of the word "lasciviousness" in the definition of "prurient interest." It seems remarkable then that it would be unconstitutional to use the word "lust" as an additional word when it is beyond debate that the terms "lust" and "lascivious" are interchangeable synonyms.

Some members of the public might have trouble giving a specific definition of the term "lasciviousness." There can be no constitutional violation by merely adding a more common synonym to give clarity to the word lasciviousness. Simplicity in legislative drafting should be recognized as a desirable goal, not an unconstitutional action.

There is nothing in any decision of this Court which dictates that the use of the *Roth* footnote or the ordinary dictionary definition of the word "prurient" is constitutionally impermissible. It boggles the imagination to suggest that the draftsmen of the First Amendment intended any such definitional nitpicking.

THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE TERM PRURIENT IS ONLY ONE ELEMENT NECESSARY TO ACHIEVE A FINDING OF OBSCENITY

It should be noted at the outset that the members of Concerned Women for America do not share the Ninth Circuit's enthusiasm for "good, old-fashioned, healthy lust." 725 F.2d at 492. Apparently the court of appeals' zealous regard for lust blinded their legal judgment. the lower court failed to even note that appeal to the prurient interest is only one element necessary to a finding of obscenity under House Bill 626. As dicated by this Court's decision in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973), House Bill 626 requires that *all* of the following elements be proven in order to sustain a finding of obscenity:

1. The average person, applying contemporary community standards, would find [the material], when considered as a whole, appeals to the prurient interest; *AND*

2. [the material] depicts or describes patently offensive representations of or descriptions of:

(a) ultimate sex acts, normal or perverted actual or simulated; or

(b) masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibtion of the genitals or genital area; or

(c) violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; *AND*

3. which when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political or scientific value.

A mere finding that the prurient interest or lustfulness is present will not suffice. All three elements must be present. The material must appeal to the prurient interest *and* contain some type of patently offensive representation of the type of ultimate sex acts listed *and* lack serious literary, artistic, political, or scientific value.

The suggestion that "it might be necessary to hale into court our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles," [725 F.2d at 492] is ludicrous. A mere finding that an appeal to lust is a part of a presentation is not enough. Your amicus is not aware of any perfume ads or soft drink ads which contain patently offensive representations of ultimate sex acts of the type listed in House Bill 626.

Simply stated, House Bill 626 does not outlaw "good, old-fashioned, healthy lust." It merely outlaws patently offensive presentations of ultimate sex acts, which appeal to the lustful interest in sex, and which lack serious literary, artistic, political, or scientific value.

The only thing "overbroad" in this case is the imagination of the Ninth Circuit which conjures up cases against Pepsi Cola and Chanel No. 5. Until Pepsi and perfume are peddled with patently offensive ultimate sex acts as part of their message, there is no danger from House Bill 626.

V

CONCLUSION

The State of Washington is entitled to outlaw obscene presentations as defined by this Court. In drafting its law, it is not constitutionally impermissible to rely on this Court's definition in *Roth*. Neither is it unconstitutional to

use an ordinary dictionary definition of the term prurient to end confusion on the part of jurors.

It is time to end the nitpicking in the area of obscenity law. The presence of the word "lust" is constitutionally permissible. The people of the State of Washington have been trying since 1977 to create a constitutionally sound obscenity law. According to the Ninth Circuit, this effort falls one word short. This Court should reverse this unwarranted interference in the legitimate exercise of legislative authority by the people of the State of Washington and their elected officials.

Respectfully submitted,

CONCERNED WOMEN FOR AMERICA
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FOUNDATION

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November 12, 1984

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amicus Curiae has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 15th day of November, 1984, to:

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APPENDIX A

The Appendix below was taken from the Spokane, Washington *Daily Chronicle,* March 15, 1977, Section 1, Page 3.

Films Held Not Obscene; More Prosecution Likely

By JOHN WEBSTER

After six hours of deliberation a four-man, eight-woman Superior Court jury last night found that the films "Deep Throat" and "The Private Afternoon of Pamela Mann" are not obscene.

The jury acquitted the operators of the Dishman Theater, Gaiety Theatres, Inc., and Roger H. Forbes of Seattle, Gaiety's president, of three counts of exhibition of an obscene motion picture, stemming from the two films' showing last year at the Dishman.

The state may not appeal the verdict. Under the law, the prosecution never has a right to appeal a verdict of innocent, although a verdict of guilty may be appealed by a defendant.

However, Pros. Atty. Donald C. Brockett said today that, despite the verdict, Gaiety Theatres and Forbes will be prosecuted on two more recent charges of exhibition of an obscene motion picture.

Those charges, to which the defendants pleaded innocent on Friday, are based on the Jan. 25 showing of the films, "The Evil Ways of Love" and "Behind the Green Door" at the Dishman, which is leased by Gaiety Theatres.

An April 25 Superior Court trial has been scheduled on the two charges.

William J. Powell, a Spokane attorney who represented Gaiety Theatres, said he talked with some of the jurors after the verdict was returned at 10:30 last night and was told the panel decided the films were not obscene in that the two movies, when considered as a whole, did not appeal to the prurient interest of an average person applying contemporary community standards.

The "prurient interest" test was one question the jury had to consider to rule whether the films were obscene.

Powell said jurors told him they were somewhat confused by Lally's instruction to them about the meaning of "prurient interest." The jurors asked Judge John J. Lally to clarify the prurient interest instruction, so at 10 p.m. he read a revised instruction.

The modified instruction said prurient interest "refers to material having a tendency to excite lustful thought, or stated another way, prurient refers to a shameful or morbid interest in nudity or sex."

Less than 30 minutes after receiving that instruction, the jury returned its verdict.

Other tests the jury had to consider in determining the obscenity issue were whether the films portrayed sexual activity in a "patently offensive" way, and whether the films, when considered as a whole, lacked any serious literary, artistic, political or scientific value.

All three of those factors had to be true for a guilty verdict.

Forbes was represented by Spokane attorney Bryan Harnetiaux and Robert Smith of Atlanta. Smith has

argued before the U.S. Supreme Court about 12 times in obscenity cases, and is regarded as a specialist in the field of law of obscenity.

In his final argument to the jury, Smith said it is the community standard here that such things as bestiality, sado-masochism and sexual exploitation of children are obscene and should be suppressed.

But "Deep Throat" and "Pamela Mann" do not portray such acts, Smith told the jury, adding, "the kinds of sex depicted here may not be for us, but it is important to a lot of people in our community."

Discussing the social ideal of a harmonious marriage and obedient children, and divorce rates which indicate many do not reach that ideal, Smith turned to the subject of community values as to what is acceptable in X-rated movies.

"When we talk about community standards, we talk about what is, not some unattainable goal," the attorney said.

He had presented testimony that films such as "Deep Throat" and "Pamela Mann" are of value in therapy for persons with sexual dysfunctions, and he told the jury that "if a film is of value to any segment of our society you must acquit, like it or not."

Repression is never good for the sexual health of the community," Smith argued.